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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE)
INVOLUNTARY TERMINATION)
OF THE PARENT-CHILD RELATIONSHIP)
OF B.P. AND T.J., MINOR CHILDREN)
AND THEIR FATHER, TONY PERRY,)

TONY PERRY,)

Appellant-Respondent,)

vs.)

MARION COUNTY DEPARTMENT)
OF CHILD SERVICES,)

Appellee – Petitioner,)

and)

CHILD ADVOCATES, INC.,)
Guardian ad Litem – Co-petitioner,)

and)

ASHLEY JENKINS,)
Respondent.)

No. 49A05-0612-JV-728

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Victoria Ransberger, Special Judge
Cause No. 49D09-0506-JT-21971

June 12, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

In this appeal, Tony Perry challenges the trial court's termination of his parental rights over his children, B.P. and T.J.¹ Perry challenges the sufficiency of the evidence showing T.J. was removed from his care pursuant to a dispositional decree and showing B.P. was joined in the termination petition. Further, Perry argues the evidence was not sufficient to support the trial court's judgment. Finally, he asserts the trial court violated his right to due process by failing to transport him to the fact-finding hearing. Concluding the trial court correctly determined these issues, we affirm.

Facts and Procedural History

On September 6, 2004, the Marion County Department of Child Services (DCS) received a report that B.P. and T.J. were neglected when their mother, Ashley Jenkins, was arrested for criminal recklessness with a weapon. Perry had allegedly hit Jenkins, and then fled the scene before the police arrived. The maternal grandmother, who was the legal

¹ The parent-child relationship between these children and their mother, Ashley Jenkins, was also terminated by this order. Jenkins is not an active party to this appeal. See Ind. Appellate Rule 17(A).

guardian of B.P., was present and took custody of the children.² A petition alleging T.J. was a child in need of services (“CHINS”) was filed.

Then, in November of 2004, the DCS received a report alleging the grandmother had tested positive for cocaine. Ultimately, B.P. was removed from her custody and the grandmother’s guardianship of B.P. was terminated. On December 6, 2004, an Order to File CHINS Petition was issued, finding probable cause to believe B.P. is a CHINS.

Perry was ordered to participate in services for possible reunification with the children. At the termination hearing, DCS case manager Nakia Mable stated the court recommended that Perry complete a parenting assessment with a drug and alcohol evaluation, participate in and successfully complete Intensive Outpatient treatment, submit to weekly random drug screens, and participate in parenting classes, anger management counseling and home based counseling. Perry completed the parenting assessment. However, his referral for random drug screens was closed due to lack of participation. No referral was made for parenting and anger management classes as Perry did not successfully participate in and complete his Intensive Outpatient treatment. During this time, Perry was convicted and sentenced for murder and was unable to complete the services.

Mable further testified that the original plan for the children and parents was reunification, but the plan changed due to the parents’ lack of participation in the services that were ordered in the dispositional order in the CHINS matter. The original plan of reunification was changed to adoption.

² There is a third child, J.J., who is not related to Perry and whose case was dismissed from the current proceedings.

A petition for involuntary termination of the parent-child relationship, between T.J., her mother and Perry, was filed June 6, 2005. Also filed was a motion to amend petition requesting to join parents and children under Indiana Rule of Trial Procedure 19(A)(1). That motion, filed on April 12, 2006, sought to join B.P. in the pending petition against the mother and Perry.

On September 6, 2006, Perry filed his motion for transport order requesting the court issue a transport order for his attendance at the fact finding hearing scheduled for October. That motion was denied.

The termination trial occurred on October 19, 2006, and the trial court issued its “Order Terminating the Parent-Child Relationship” on October 25, 2006. Perry now appeals.

Discussion and Decision

I. Standard of Review

When reviewing a termination of parental rights, we will not reweigh the evidence or judge the credibility of the witnesses. Rather, we will consider only the evidence and reasonable inferences therefrom which are most favorable to the judgment. We will set aside the trial court’s findings and judgment only if they are clearly erroneous. A finding is clearly erroneous when there are no facts or inferences drawn therefrom that support it. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. In re Involuntary Termination of Parent Child Relationship of A.H., 832 N.E.2d 563, 570 (Ind. Ct. App. 2005).

II. Sufficiency of the Evidence

Perry challenges the sufficiency of the evidence supporting the trial court’s order. To

effect the involuntary termination of the parent-child relationship, the State must present clear and convincing evidence establishing that:

(A) one (1) of the following exists:

(i) the child has been removed from the parent for at least six (6) months under a dispositional decree;

(ii) a court has entered a finding under IC 31-34-21-5.6 that reasonable efforts for family preservation or reunification are not required, including a description of the court's finding, the date of the finding, and the manner in which the finding was made; or

(iii) after July 1, 1999, the child has been removed from the parent and has been under the supervision of a county office of family and children for at least fifteen (15) months of the most recent twenty-two (22) months;

(B) there is a reasonable probability that:

(i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or

(ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;

(C) termination is in the best interests of the child; and

(D) there is a satisfactory plan for the care and treatment of the child.

Ind. Code §§ 31-35-2-4(b)(2); 31-34-12-2.

Perry first challenges the sufficiency of the evidence showing that T.J. was removed from his care under a dispositional decree. However, at the termination hearing, Nakia Mable, a DCS family case manager, stated that a CHINS petition relating to T.J. was filed after the report of abuse in September of 2004. She also stated at the termination hearing that the juvenile court ordered Perry to participate in services for the possible reunification with the children, but the plan for reunification changed due to the parents' lack of participation in

the services that were previously ordered in the dispositional order in the CHINS matter. These statements support an inference there was a determination that T.J. was removed under a dispositional decree.³

Perry also argues the evidence does not sufficiently show that B.P. was properly joined in the petition for involuntary termination of parental rights over T.J. However, a petition for involuntary termination of the parent-child relationship, as to T.J. and Perry, was filed on June 6, 2005. Appellant's App. at 11. Later, the DCS filed a "Motion For Leave To Amend Petition to Join Under Rule 19 Parents and Children" stating the intention to join B.P. to the termination petition pending in relation to T.J., her mother and Perry. Appellant's App. at 41. Perry is correct that the Appellant's Appendix contains no order granting this motion.⁴ However, as the State argues, by failing to raise this issue at the termination hearing, Perry has waived the issue. At the beginning of trial on the termination petition, the court inquired whether the parties were ready to proceed as to B.P. and T.J., and Perry's counsel actively participated in the examination of witnesses and review of exhibits. "A party's failure to raise the issue of non-joinder of otherwise indispensable parties under Trial Rule 19 in a meaningful and timely manner generally results in waiver of that issue." City of Terre Haute v. Simpson, 746 N.E.2d 359, 365 (Ind. Ct. App. 2001), trans. denied.

Perry also challenges the sufficiency of the evidence showing his rights had to be terminated to protect the children. He asserts that as he is in jail, the reasons for removing

³ The Appellee's Appendix contains documents showing the CHINS Continued Initial Hearing, the disposition hearing, and participation decree relating to T.J. and Perry.

⁴ We note the chronological case summary included in the Appellant's Appendix begins with an entry dated September 26, 2006.

the children from his custody are not going to recur. However, we find ample evidence to support the trial court's finding that the conditions causing the children to be placed outside of Perry's care are unlikely to change, namely, his use of illegal drugs, his contact with "criminal justice" and his inability to demonstrate a capability to discharge parenting duties and responsibilities. The record shows Perry was ordered to complete home based counseling, parenting assessment with drug and alcohol evaluation and follow all recommendations, complete parenting classes, provide random screens, and establish paternity. Before his arrest, Perry was referred for random screens, but his file was closed because of his lack of participation. Also, he was convicted and sentenced for murder. Perry was not able to show an improvement in his parenting ability through participation in court ordered services. Instead, lack of compliance in services, criminal behavior and lack of a relationship with the children were shown. Therefore, we conclude the evidence was sufficient to support the judgment of the trial court that the DCS presented clear and convincing evidence that the conditions leading to the children's removal will not be remedied.

III. Attendance at Hearing

Perry argues the trial court violated his due process rights when it refused to transport him from jail to the termination hearing. He argues the evidence was not sufficient to show a security risk or that alternatives to a trial in absentia had been investigated.

When terminating a parent-child relationship, the State is bound by the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In re E.E., 853 N.E.2d 1037, 1043 (Ind. Ct. App. 2006), trans. denied. "The fundamental

requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” Thompson v. Clark County Div. of Family and Children, 791 N.E.2d 792, 795 (Ind. Ct. App. 2003), trans. denied (quoting Mathews v. Eldridge, 424 U.S. 319, 333 (1976)).

Assessing whether a parent’s due process rights have been violated in a termination proceeding involves the balancing of three factors: (1) the private interests affected by the proceeding; (2) the risk of error created by the State’s chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure. Id. The balancing of these factors recognizes that although due process is not dependent on the underlying facts of the particular case, it is nevertheless “flexible and calls for such procedural protections as the particular situation demands.” Id. (quoting Mathews, 424 U.S. at 334).

An incarcerated parent does not have a constitutional right to be physically present at a final termination hearing. Thompson, 791 N.E.2d 794. The decision whether to permit an incarcerated person to attend such a hearing rests within the sound discretion of the trial court. J.T. v. Marion County Office of Family and Children, 740 N.E.2d 1261, 1265 (Ind. Ct. App. 2000), trans. denied, abrogated on other grounds by Baker v. Marion County Office of Family and Children, 810 N.E.2d 1035 (Ind. 2004). A parent is entitled to representation in a termination hearing, and the trial court shall provide to such parent or his attorney an opportunity to be heard and make recommendations at the hearing. Ind. Code §§ 31-32-2-5, 31-35-2-6.5(e). Furthermore, in termination proceedings, a parent is entitled to: (1) cross-examine witnesses; (2) obtain witnesses or tangible evidence by compulsory process; and (3)

introduce evidence on their behalf. Ind. Code § 31-32-2-3(b).

Here, we fail to find that Perry's rights were compromised. Perry was represented by counsel at the hearing. He did cross-examine the State's witnesses, DCS case managers Nakia Mable and Wendy Taylor. Mable testified that Perry failed to complete the offered services which included Intensive Outpatient treatment, anger management/domestic violence counseling, parenting classes, supervised visitation and home based counseling. Also, Perry's counsel made objections throughout the proceeding. Moreover, we note that the trial court explained it denied Perry's motion because Perry's absence from the trial was due to his being in jail for murder with an earliest expected release date of 2040. The court determined that the security risks outweigh the need for him to be physically present. Therefore, given that Perry does not have a constitutional right to be present at the hearing, that his absence was due to his incarceration, and that he was represented by counsel who actively participated in the termination hearing, we conclude that the trial court's denial of Perry's motion to transport him to the hearing did not deny Perry due process of law.

Conclusion

The evidence was sufficient to support the inference that there was a determination that T.J. was removed from the parent under a dispositional decree. Perry waived his challenge to the sufficiency of the termination petition by failing to raise the issue at trial. The evidence was sufficient to support the termination of Perry's parental rights over T.J. and B.P. Finally, Perry was not denied due process of law by the trial court's denial of his request to be transported from jail to the termination hearing.

Affirmed.

SULLIVAN, J., and VAIDIK, J., concur.